

HOUSE BILL NO. 67

INTRODUCED BY JENT

BY REQUEST OF THE DEPARTMENT OF ADMINISTRATION

A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING PROVISIONS OF THE MONTANA PROCUREMENT ACT; PROVIDING THAT THE PUBLIC HAS THE RIGHT TO INSPECT COMPETITIVE SEALED BIDS AFTER THEY ARE OPENED, SUBJECT TO SPECIFIED LIMITATIONS; PROVIDING THAT ART PURCHASED OR COMMISSIONED FOR A MUSEUM OR PUBLIC DISPLAY IS EXEMPT FROM THE ACT; REVISING THE INFORMATION IN A BID OR OFFER THAT MAY NOT BE DISCLOSED; REMOVING THE SUNSET FROM THE PROVISION AUTHORIZING AN AGENCY TO REQUEST AN ALTERNATIVE PROCUREMENT METHOD; REMOVING THE CAP ON THE AMOUNT FOR WHICH A LETTER OF CREDIT MAY BE ISSUED; PROVIDING AN EXCEPTION TO HOW LONG PERFORMANCE SECURITY ON A CONTRACT MUST BE KEPT; CLARIFYING EXCEPTIONS TO THE CONTRACT TIME PERIOD LIMIT SPECIFIED IN THE ACT; AMENDING SECTIONS 18-4-126, 18-4-132, 18-4-301, 18-4-303, 18-4-304, 18-4-308, 18-4-312, AND 18-4-313, MCA; REPEALING SECTION 29, CHAPTER 181, LAWS OF 2001; AND PROVIDING AN EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 18-4-126, MCA, is amended to read:

"18-4-126. Public access to procurement information -- records -- retention. (1) Procurement information is a public writing and must be available to the public as provided in 2-6-102, 18-4-303, and 18-4-304.

(2) All procurement records must be retained, managed, and disposed of in accordance with the state records management program, Title 2, chapter 6.

(3) Written determinations required by this chapter must be retained in the appropriate official contract file of the department or the purchasing agency administering the procurement in accordance with the state records management program."

Section 2. Section 18-4-132, MCA, is amended to read:

1 **"18-4-132. Application.** (1) This chapter applies to the expenditure of public funds irrespective of their
2 source, including federal assistance money, by this state acting through a governmental body under any
3 contract, except a contract exempted from this chapter by this section or by a statute that provides that this
4 chapter does not apply to the contract. This chapter applies to a procurement of supplies or services that is at
5 no cost to the state and from which income may be derived by the vendor and to a procurement of supplies or
6 services from which income or a more advantageous business position may be derived by the state. This
7 chapter does not apply to either grants or contracts between the state and its political subdivisions or other
8 governments, except as provided in part 4. This chapter also applies to the disposal of state supplies. This
9 chapter or rules adopted pursuant to this chapter do not prevent any governmental body or political subdivision
10 from complying with the terms and conditions of any grant, gift, bequest, or cooperative agreement.

11 (2) This chapter does not apply to construction contracts.

12 (3) This chapter does not apply to expenditures of or the authorized sale or disposal of equipment
13 purchased with money raised by student activity fees designated for use by the student associations of the
14 university system.

15 (4) This chapter does not apply to contracts entered into by the Montana state lottery that have an
16 aggregate value of less than \$250,000.

17 (5) This chapter does not apply to contracts entered into by the state compensation insurance fund to
18 procure insurance-related services.

19 (6) This chapter does not apply to employment of:

20 (a) a registered professional engineer, surveyor, real estate appraiser, or registered architect;

21 (b) a physician, dentist, pharmacist, or other medical, dental, or health care provider;

22 (c) an expert witness hired for use in litigation, a hearings officer hired in rulemaking and contested case
23 proceedings under the Montana Administrative Procedure Act, or an attorney as specified by executive order
24 of the governor;

25 (d) consulting actuaries;

26 (e) a private consultant employed by the student associations of the university system with money
27 raised from student activity fees designated for use by those student associations;

28 (f) a private consultant employed by the Montana state lottery;

29 (g) a private investigator licensed by any jurisdiction;

30 (h) a claims adjuster; or

(i) a court reporter appointed as an independent contractor under 3-5-601.

(7) (a) This chapter does not apply to electrical energy purchase contracts by the university of Montana or Montana state university, as defined in 20-25-201.

(b) Any savings accrued by the university of Montana or Montana state university in the purchase or acquisition of energy must be retained by the board of regents of higher education for university allocation and expenditure.

(8) This chapter does not apply to the purchase or commission of art for a museum or public display."

Section 3. Section 18-4-301, MCA, is amended to read:

"18-4-301. (Temporary) Definitions. As used in this part, the following definitions apply:

(1) "Alternative procurement method" means a method of procuring supplies or services in a manner not specifically described in this chapter, but instead authorized by the department under 18-4-302.

(2) "Cost-reimbursement contract" means a contract under which a contractor is reimbursed for costs that are allowable and allocable in accordance with the contract terms and the provisions of this chapter and a fee, if any.

(3) (a) "Displacement" means the layoff, demotion, or involuntary transfer of a state employee.

(b) Displacement does not include changes in shift or days off or reassignment to other positions within the same class and at the same general location.

(4) "Established catalog price" means the price included in a catalog, price list, schedule, or other form that:

(a) is regularly maintained by a manufacturer or contractor;

(b) is either published or otherwise available for inspection by customers; and

(c) states prices at which sales are currently or were last made to a significant number of any category of buyers or buyers constituting the general buying public for the supplies or services involved.

(5) "Invitation for bids" means all documents, whether attached or incorporated by reference, used for soliciting bids.

(6) "Office supply" means an item included under the office supply commodity class codes maintained by the department.

(7) "Purchase description" means the words used in a solicitation to describe the supplies or services to be purchased and includes specifications attached to or made a part of the solicitation.

(8) "Request for proposals" means all documents, whether attached or incorporated by reference, used for soliciting proposals.

(9) "Responsible bidder or offeror" means a person who has the capability in all respects to perform fully the contract requirements and the integrity and reliability that will ensure good faith performance.

(10) "Responsive ~~bidder or offeror~~" means ~~a person who has submitted a bid that~~ conforms in all material respects to the invitation for bids OR REQUEST FOR PROPOSALS.

(11) "Term contract" means a contract in which supplies or services are purchased at a predetermined unit price for a specific period of time. (~~Terminates June 30, 2005--sec. 29, Ch. 181, L. 2001.~~)

~~18-4-301. (Effective July 1, 2005) Definitions.~~ As used in this part, the following definitions apply:

~~(1) "Cost-reimbursement contract" means a contract under which a contractor is reimbursed for costs that are allowable and allocable in accordance with the contract terms and the provisions of this chapter and a fee, if any.~~

~~(2) (a) "Displacement" means the layoff, demotion, or involuntary transfer of a state employee.~~

~~(b) Displacement does not include changes in shift or days off or reassignment to other positions within the same class and at the same general location.~~

~~(3) "Established catalog price" means the price included in a catalog, price list, schedule, or other form that:~~

~~(a) is regularly maintained by a manufacturer or contractor;~~

~~(b) is either published or otherwise available for inspection by customers; and~~

~~(c) states prices at which sales are currently or were last made to a significant number of any category of buyers or buyers constituting the general buying public for the supplies or services involved.~~

~~(4) "Invitation for bids" means all documents, whether attached or incorporated by reference, used for soliciting bids.~~

~~(5) "Office supply" means an item included under the office supply commodity class codes maintained by the department.~~

~~(6) "Purchase description" means the words used in a solicitation to describe the supplies or services to be purchased and includes specifications attached to or made a part of the solicitation.~~

~~(7) "Request for proposals" means all documents, whether attached or incorporated by reference, used for soliciting proposals.~~

~~(8) "Responsible bidder or offeror" means a person who has the capability in all respects to perform fully~~

~~the contract requirements and the integrity and reliability that will ensure good faith performance.~~

~~———— (9) "Responsive bidder or offeror" means a person who has submitted a bid or proposal that conforms in all material respects to the invitation for bids or request for proposals.~~

~~———— (10) "Term contract" means a contract in which supplies or services are purchased at a predetermined unit price for a specific period of time."~~

Section 4. Section 18-4-303, MCA, is amended to read:

"18-4-303. Competitive sealed bidding. (1) An invitation for bids must be issued and must include a purchase description and conditions applicable to the procurement.

(2) Adequate public notice of the invitation for bids must be given a reasonable time before the date set forth in the invitation for the opening of bids, in accordance with rules adopted by the department. Notice may include publication in a newspaper of general circulation at a reasonable time before the bid opening.

(3) Bids must be opened publicly at the time and place designated in the invitation for bids. Each bidder and any member of the public has the right to be present, either in person or by agent, when the bids are opened and has the right to examine and inspect all bids: after they are opened and reviewed by the procurement officer for release, subject to the same limitations specified in 18-4-304(4) for competitive sealed proposals.

(4) The amount of each bid and other relevant information as may be specified by rule, together with the name of each bidder, must be recorded. The record must be open to public inspection.

(5) After the time of award, all bids and bid documents must be open to public inspection in accordance with the provisions of ~~2-6-102 and are subject to the requirements of subsection (4)~~ 18-4-126.

~~(4) Bids must be available for public inspection when the bids are opened if:~~

~~———— (a) the invitation for bids is issued by a state agency to contract with the private sector to provide services currently conducted by state employees; and~~

~~———— (b) acceptance of bids would result in the displacement of five or more state employees.~~

~~(5)~~(6) Bids must be unconditionally accepted without alteration or correction, except as authorized in this chapter. Bids must be evaluated based on the requirements set forth in the invitation for bids, which may include criteria to determine acceptability, such as inspection, testing, quality, workmanship, delivery, and suitability for a particular purpose. Those criteria that will affect the bid price and be considered in evaluation for award must be objectively measurable, such as discounts, transportation costs, and total or life-cycle costs. The invitation for bids must set forth the evaluation criteria to be used. Only criteria set forth in the invitation for bids

1 may be used in bid evaluation.

2 ~~(6)(7)~~ Correction or withdrawal of inadvertently erroneous bids, before or after award, or cancellation
3 of awards or contracts based on bid mistakes may be permitted in accordance with rules adopted by the
4 department. After bid opening, changes in bid prices or other provisions of bids prejudicial to the interest of the
5 state or fair competition may not be permitted. Except as otherwise provided by rule, all decisions to permit the
6 correction or withdrawal of bids or to cancel awards or contracts based on bid mistakes must be supported by
7 a written determination made by the department.

8 ~~(7)(8)~~ ~~The contract~~ If an award is made, it must be awarded made with reasonable promptness by
9 written notice to the lowest responsible and responsive bidder ~~or offeror~~ whose bid meets the requirements and
10 criteria set forth in the invitation for bids, including the preferences established by Title 18, chapter 1, part 1. If
11 all bids exceed available funds as certified by the appropriate fiscal officer and the ~~low~~ lowest responsible and
12 responsive bid does not exceed the funds by more than 5%, the director or the head of a purchasing agency
13 may, in situations in which time or economic considerations preclude resolicitation of a reduced scope, negotiate
14 an adjustment of the bid price, including changes in the bid requirements, with the ~~low~~ lowest responsible and
15 responsive bidder ~~or offeror~~ in order to bring the bid within the amount of available funds.

16 ~~(8)(9)~~ When it is considered impractical to initially prepare a purchase description to support an award
17 based on price, an invitation for bids may be issued requesting the submission of unpriced offers, to be followed
18 by an invitation for bids limited to those bidders whose offers have been qualified under the criteria set forth in
19 the first solicitation."

20
21 **Section 5.** Section 18-4-304, MCA, is amended to read:

22 **"18-4-304. Competitive sealed proposals.** (1) The department may procure supplies and services
23 through competitive sealed proposals.

24 (2) Proposals must be solicited through a request for proposals.

25 (3) Adequate public notice of the request for proposals must be given in the same manner as provided
26 in 18-4-303(2).

27 (4) After the proposals have been opened at the time and place designated in the request for proposals
28 and reviewed by the procurement officer for release, proposal documents may be inspected by the public,
29 subject to the limitations of:

30 (a) the Uniform Trade Secrets Act, Title 30, chapter 14, part 4;

(b) matters involving individual safety as determined by the department; AND
~~—— (c) information requested by the department to establish vendor responsibility unless prior written consent has been given by the vendor, pursuant to 18-4-308; and~~

~~(d)~~(c) other constitutional protections.

(5) The request for proposals must state the evaluation ~~factors~~ criteria and their relative importance.
~~The award~~ If an award is made, it must be made to the responsible and responsive ~~bidder or~~ offeror whose proposal best meets the evaluation criteria. Other ~~factors or~~ criteria may not be used in the evaluation. The contract file must demonstrate the basis on which the award is made.

(6) The department may discuss a proposal with an offeror for the purpose of clarification or revision of the proposal."

SECTION 6. SECTION 18-4-308, MCA, IS AMENDED TO READ:

"18-4-308. Nonresponsibility of bidders and offerors --nondisclosure. ~~(1)~~ A written determination of nonresponsibility of a bidder or offeror must be made in accordance with rules adopted by the department. The unreasonable failure of a bidder or offeror to promptly supply information in connection with an inquiry with respect to responsibility may be grounds for a determination of nonresponsibility with respect to ~~such that~~ that bidder or offeror.

~~—— (2) Information furnished by a bidder or offeror pursuant to this section may not be disclosed outside of the department or the purchasing agency without prior written consent by the bidder or offeror."~~

Section 7. Section 18-4-312, MCA, is amended to read:

"18-4-312. Bid and contract performance security. (1) For state contracts for the procurement of services or of supplies, the department may in its discretion require:

(a) bid security;

(b) contract performance security to guarantee the faithful performance of the contract and the payment of all laborers, suppliers, mechanics, and subcontractors; or

(c) both bid and contract performance security.

(2) (a) If security is required under subsection (1), the following types of security may be required to be deposited with the state:

(i) a sufficient bond with a licensed surety company as surety;

1 (ii) an irrevocable letter of credit ~~not to exceed \$100,000~~ in accordance with the provisions of Title 30,
2 chapter 5, part 1;

3 (iii) money of the United States;

4 (iv) a cashier's check, certified check, bank money order, certificate of deposit, money market certificate,
5 or bank draft that is drawn or issued by a federally chartered or state-chartered bank or savings and loan
6 association that is insured by or for which insurance is administered by the federal deposit insurance corporation
7 or that is drawn and issued by a credit union insured by the national credit union share insurance fund.

8 (b) The department may not require that a bond required pursuant to subsection (2)(a)(i) be furnished
9 by a particular surety company or by a particular insurance producer for a surety company.

10 (3) The amount and type of the security must be determined by the department to be sufficient to cover
11 the risk involved to the state. The security must be payable to the state of Montana. Contract performance
12 security must remain in effect for the entire contract period, except as provided pursuant to an agency liquor
13 store franchise agreement under 16-2-101. In determining the amount and type of contract performance security
14 required for each contract, the department shall consider the nature of the performance and the need for future
15 protection to the state. In determining the need for and amount of bid security, the department shall consider the
16 risks involved to the state if a successful bidder or offeror fails to enter into a formal contract. The considerations
17 must include but are not limited to the type of supply or service being procured, the dollar amount of the
18 proposed contract, and delivery time requirements. The department may adopt rules to assist it in making these
19 determinations and in protecting the state in dealing with irrevocable letters of credit. Bid and contract security
20 requirements must be included in the invitations for bids or requests for proposals.

21 (4) If a bidder or offeror to whom a contract is awarded fails or refuses to enter into the contract or
22 provide contract performance security, as required by the invitation for bid or request for proposal, after
23 notification of award, the department may, in its discretion, require the bidder or offeror to forfeit the bid security
24 to the state and become immediately liable on the bid security, but not in excess of the sum stated in the
25 security. The liability of the bidder or offeror, the maker of the security or bid bond, or the liability on the bid bond
26 or other security may not exceed the amount specified in the invitation for bid or request for proposal.

27 (5) Negotiable instruments provided as bid security must be refunded to those bidders or offerors whose
28 bids or proposals are not accepted.

29 (6) The provisions of Title 18, chapter 1, part 2, and Title 18, chapter 2, parts 2 and 3, do not apply to
30 procurements under this chapter."

Section 8. Section 18-4-313, MCA, is amended to read:

"18-4-313. Contracts -- terms, extensions, and time limits. (1) ~~Unless~~ Except as provided in subsection (2) or unless otherwise provided by law, a contract, lease, or rental agreement for supplies or services may not be made for a period of more than 7 years. However, the department may contract for hardware, software, or other information technology resources, the department of revenue may contract with liquor agencies, and the department of public health and human services may contract for the medicaid management information system (MMIS) for a period not to exceed 10 years. A contract, lease, or rental agreement may be extended or renewed if the terms of the extension or renewal, if any, are included in the solicitation, if funds are available for the first fiscal period at the time of the agreement, and if the total contract period, including any extension or renewal, does not exceed 7 years. Payment and performance obligations for succeeding fiscal periods are subject to the availability and appropriation of funds for the fiscal periods.

(2) The contract term limit specified in subsection (1) does not apply to:

(a) a contract for hardware, software, or other information technology resources, which may be made for a period not to exceed 10 years;

(b) a department of revenue liquor store contract governed by the term specified in 16-2-101; and

(c) a department of corrections contract governed by the term specified in 53-1-203, 53-30-505, or 53-30-608.

~~(2)(3)~~ Prior to the issuance, extension, or renewal of a contract, it must be determined that:

(a) estimated requirements cover the period of the contract and are reasonably firm and continuing; and

(b) the contract will serve the best interests of the state by encouraging effective competition or otherwise promoting economies in state procurement.

~~(3)(4)~~ If funds are not appropriated or otherwise made available to support continuation of performance in a subsequent fiscal period, the contract must be canceled."

NEW SECTION. Section 9. Repealer. Section 29, Chapter 181, Laws of 2001, is repealed.

NEW SECTION. Section 10. Effective date. [This act] is effective July 1, 2005.

- END -